UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

David Saxe Productions, LLC		
	Case No.	**28-CA-219225**
V Theater Group, LLC		**28-CA-223339**
		28-CA-223362
and		**28-CA-223376**
		28-CA-224119
International Alliance of Theatrical Stage Employees		**28-RC-219130**

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RESPONDENTS DAVID SAXE PRODUCTIONS AND V THEATER GROUP, LLC'S REPLY BRIEF IN SUPPORT OF RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

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Respondents reply to General Counsel's Answering Brief ("GCB") and Union's Answering Brief ("UB") to Respondents' Brief in Support of Exceptions ("RB") below.

I. ARGUMENT.

1. Due Process Requires the Board to Review the ALJ's Credibility Findings.

Throughout the GCB, General Counsel ("CGC") relies primarily on arguments pertaining to credibility, asserting that all exceptions based on credibility should be denied because the "the Board's well-settled policy not to overrule an ALJ's credibility findings unless the clear preponderance of all relevant evidence demands otherwise." GCB, 1[1]. CGC further claims Respondents seek "unprecedented scrutiny" of the ALJ's credibility findings and asserts, without analysis or legal authority, that Respondents' position on credibility is legally erroneous. Id. at 2.

What CGC hopes to avoid is a precise application of the Board's standard for evaluating an ALJ's credibility findings. As recognized in Standard Dry Wall Products, Inc.:

> In all cases, . . . , the Act commits to the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the preponderance of the evidence. Accordingly, in all cases which come before us for decision we base our findings as to the facts upon a de novo review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings.

91 NLRB 544, 544-45 (1950). The Board is duty-bound, *via the Act*, to determine the facts of each case for itself. This duty is balanced against the reality that "the Trial Examiner, . . . not the Board, has had the advantage of observing the witnesses while they testified." Id. at 545. Thus, it is the Board's policy to "attach great weight to a Trial Examiner's credibility findings *insofar as they are based on demeanor*." Id. Deferral to an ALJ's credibility findings is *not* required based upon factors other than demeanor. In such situations, the Board's duty is to independently evaluate the facts. See Valley Steel Prods. Co., 111 NLRB 1338, 1345 (1955) ("insofar as credibility findings

[1] The Union makes similar arguments citing no legal authority in support, to which the same argument applies. UB, 4.

are based upon factors other than demeanor, in consonance with the policy set forth in Standard Dry Wall Products, the Board will proceed with an independent evaluation"); Jewel Bakery, Inc., 268 NLRB 1326, 1327 (1984) ("in enunciating the Standard Dry Wall policy the Board did not cede its statutory 'power and responsibility of determining the facts as revealed by the preponderance of the evidence'"); Starcraft Aerospace, Inc., 346 NLRB 1228, 1231 (2006) (reversing ALJ and explaining "to the extent that credibility findings are based upon factors other than demeanor, . . . , the Board itself may proceed with an independent evaluation").[2] Contrary to CGC's unsupported contention, Respondent seeks a *precise* (not heightened) application of the Board's long-standing rules for reviewing credibility findings. Where the ALJ based her credibility determinations upon factors other than demeanor and/or failed to articulate the reason for her credibility conclusions, the Board should independently assess the evidence and testimony in accord with its obligation under the Act. See EMR Photoelectric, 273 NLRB 256, n.2 (1984) ("in contested cases the Act commits to the Board the power and responsibility of determining the facts as revealed by a preponderance of the evidence, and the Board is not bound by the administrative law judge's findings of facts, but bases its findings on a de novo review of the entire record").

While CGC would prefer to classify all of the ALJ's credibility findings as relating to demeanor, the Board is more than capable of parsing out the difference. Demeanor evidence is "'wordless language'" – a witness' "intonations, his grimaces, his features, and the like." Broadcast Music, Inc. v. Havana Madrid Rest. Corp., 175 F.2d 77, 80 (2d Cir. 1949).[3] Where the

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[2]CGC makes no effort to distinguish Respondents' authority or offer a different standard for the Board's analysis. Instead, she agrees that Standard Dry Wall controls but seeks to apply only one part of the Board's decision in that case. The only legal argument CGC makes with regard to Respondents' position is incorrect; the Starcraft Board's conclusion on the application of Standard Dry Wall was necessary to its reversal of the ALJ's findings and is not, therefore, dicta.

[3] Accord Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952) (demeanor is the "carriage, behavior, bearing, manner and appearance of a witness"); Black's Law Dictionary (11th ed. 2019)

ALJ has based her decisions on factors other than demeanor, such as upon the content or quality of the testimony or a witness' memory or the witness' precision versus tendency to exaggerate in testifying, as identified in Respondents' Brief, the Board should independently assess such testimony. Red's Express, Inc., 268 NLRB 1154, 1155 (1984) (independent evaluation of testimony where "the hearing officer's credibility resolutions were not based primarily on the demeanor of the witnesses" and were instead "grounded on his assessment that the testimony... was evasive and self-serving").[4]

Further, even when a credibility determination is based upon demeanor, the Board should still consider the record as a whole, especially where the ALJ has failed to consider relevant evidence, mischaracterized the record or made some other error as identified in Respondent's brief. Jewel Bakery, 268 NLRB at 1327 ("[t]he Board has not applied its Standard Dry Wall policy so as to make inviolable an [ALJ's] credibility resolutions, including those based on demeanor"). CGC's "invocation of the demeanor factor is not a substitute for a complete review and analysis of all the record evidence." Id. Respondent carefully set forth its challenges to the ALJ's credibility findings and seeks the Board's careful consideration of each – even those related to demeanor evidence – in a manner consistent with the Board's long-standing rules. Standard Dry Wall, 91 NLRB at 545 (even demeanor determinations can be overruled where "the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect").

(defining demeanor as "outward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions").

[4] Accord Canteen Corp., 202 NLRB 767, 769 (1973) (reversing ALJ conclusion that witness' testimony was "vague, contradictory, and uncorroborated" was based upon factors other than demeanor); Colson Equip., Inc., 257 NLRB 78, 80 (1981) (reversing ALJ's credibility finding, explaining "vague" and "confusing" are factors other than demeanor); Valley Steel, 111 NLRB at 1346 (finding "inconsistent" and "equivocal" are factors other than demeanor).

2. CGC Failed to Meet its Burden to Prove Supervisory Status.

The ALJ incorrectly determined Mecca and Sojack are supervisors under the Act. Outside of a few pieces of secondary indicia, the ALJ relies solely on testimony from DeStefano that stage managers may recommend discipline. However, contrary to CGC's contentions, DeStefano's testimony regarding stage managers generally (including Estrada) is insufficient to find that specific stage managers—namely Mecca and Sojack—actually possess or exercise supervisory authority.[5] CGC relies on Sheraton Universal Hotel, 350 NLRB 1114, 1118 (2007) "and similar cases cited by the ALJ." See GCB, 5. Sheraton stands for the proposition that Sec. 2(11) requires only possession of authority to carry out an enumerated supervisory function, and not the actual exercise of authority. Sheraton, 350 NLRB at 1118. However, Board law is clear that conclusory statements lacking specificity, paper authority, or an assertion that supervisory authority has been conferred on a particular person, are insufficient to establish supervisory authority. See Lakewood Health Ctr., 365 NLRB No. 10 (Dec. 28, 2016) ("supervisory status cannot be established merely by 'paper' authority or conclusory testimony" and "evidence of supervisory status must be specific"); Coral Harbor Rehab., 366 NLRB No. 75 (May 2, 2018) (supervisory authority is "based on the existence of authority rather than on assertions that supervisory authority has been conferred on a particular person."); Alternate Concepts, Inc., 358 NLRB No. 38, slip op. at 3 (2012) ("mere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority."); Lakeview Health Center, 308 NLRB 75, 79 (1992) (employee is not a supervisor by title and theoretical power to perform one of the enumerated functions). Further, the D.C. and Fifth Circuit Courts have held "the [Act] requires. . . evidence of actual

[5] Notably, as cited in the ALJ's decision, lack of evidence is construed against the party asserting supervisory status. Dean & Deluca New York, Inc. 338 NLRB 1046, 1048 (2003).

supervisory authority visibly translated into tangible examples demonstrating the existence of such authority." Oil, Chem. & Atomic Workers v. NLRB, 445 F.2d 237, 243 (D.C. Cir. 1971); NLRB v. Sec. Guard Serv., Inc., 384 F.2d 143, 149 (5th Cir. 1967).

Here, the testimony relied on by CGC is exactly what the Board finds insufficient to prove supervisory authority. See Lakewood Health Ctr., 365 NLRB No. 10. Moreover, in a record containing over 200 exhibits and 4,000 pages of transcript, the absence of any evidence outside of DeStefano's general and conclusory testimony, is the most telling. CGC failed to meet its burden.[6] Accordingly, the Board should determine that Mecca and Sojack are not supervisors.

3. The Evidence Does Not Support Application of Mass Discharge Theory.

Under the Board's mass discharge theory, CGC must present strong evidence of animus or evidence that Respondents engaged in discharges to discourage union activity. See Delcamps, Inc., 330 NLRB 1310, 1315 (2000). In this case, however, there is no substantial evidence to support a finding that anti-union animus was the motivating factor for the discharges. Indeed, in addition to Respondents' evidence for the legitimate, non-discriminatory reasons for discharge, it is undisputed that these terminations occurred under the backdrop of the Company "righting the ship" after an ineffectual and larcenous manager, Pendergraft.[7] TR 302:20-303:7; 305:1-2; **R 88-R 90**. It is also unrefuted DeStefano was uncertain of her role following Pendergraft's departure, and she received no training when she was thrust into the role. TR 2566:20-2567:7; 2578:1-7. Once Pendergraft was terminated and DeStefano had authority to make termination decisions, she addressed the performance issues that languished during Pendergraft's tenure. TR 475:13-19;

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[6] In the absence of primary indicia—as is the case here—evidence of secondary indicia cannot provide a basis to show supervisory authority. See St. Francis Medical Center West, 323 NLRB 1046 (1997); Consolidated Services, 321 NLRB 845, 846 fn. 7 (1996).

[7] The Union agrees that Pendergraft was a "bad manager" is "not in dispute." UB, 5.

481:10-13; 2578:1-18. Ignoring such facts, the ALJ and CGC refer to the "stunningly obvious" and "dramatic timing" of the discharges occurring during a concurrent campaign. GCB, 9, 20 citing ALJD 23, 48. Nonetheless, respondent may overcome a showing of animus by establishing by a preponderance of evidence the discharge would have occurred in any event for valid reasons. Davis Supermarkets, Inc. v. NLRB, 2 F.3d 1162 (D.C. Cir. 1993). Respondents provided such evidence.[8]

4. CGC's Arguments About Knowledge of Protected Activity Are Meritless.

a. The Policies and Procedures Meeting Did Not Establish Knowledge.

CGC claims knowledge is supported by the Policy and Procedure meetings. GCB, 21. With regard to the February meeting, CGC attempts to undercut the clear timeline on the record showing the first union activity occurred on February 19 by claiming Hill and Urbanski had been discussing unionization prior. Id. CGC cites to Hill's testimony stating Divito messaged her through Facebook in "mid-February."[9] TR 1024-27; 1100-02. Even if true, the timeline does not shift so much as to occur before the February 12 meeting or allow enough time for Respondents to "react" by planning the meeting. Further, Urbanski's testimony does not support CGC's contention as he testified he and Divito discussed organizing in the "middle of February, maybe even the beginning of February", Tr 2263:8-12, but also claims the group chat was initiated in "beginning to mid-February", Tr 2263:20-21, indicating the discussions with DiVito and the Chat were very close in time. CGC's argument is further irrelevant as there is no evidence on the record that Respondents had knowledge of any such conversations. Indeed, the first allegation of Respondents' knowledge

[8] Despite CGC and Union's repeated inflammatory references to "padding the record" and lack of contemporaneous documentation, the record includes triggering events for why Respondents solicited additional documentation including Glick filing for unemployment, **GC 79; GC 81-GC 82**, and the preparation of a Position Statement filed June 6, 2018. **GC 105**; **GC 20**.

[9] Assuming this is not in reference to the group chat dated February 19, **J 2**, this Facebook chat was not introduced into evidence.

is based on Mecca's invitation to the Chat on February 19. This finding highlights the ALJ's eagerness to attribute knowledge to Respondents and should be overturned.

b. The CGC Did Not Prove Mecca Had Knowledge of Union Organizing.

It is CGC's burden to establish knowledge on the Respondents' part, not Respondents' burden to establish lack of knowledge. Sacramento Recycling & Transfer Station, 345 NLRB 564, 566 (2005). CGC claims this burden was met based on snippets of Mecca's testimony stating he saw the Chat, recognized names of participants, and knew the gist was the employees were "having issues." GCB at 8.[10] This is not enough to establish knowledge or reporting of that knowledge, especially when Mecca unequivocally identified learning about the organizing campaign after Gasca's discharge on March 17. TR 3174:2-11; Schuff Steel & Derek Dixon, 367 NLRB No. 76 (Jan. 25, 2019) (not imputing supervisor's knowledge when supervisor credibly testified did not know about the incident). While CGC argues Respondents need to rebut imputation of knowledge with an explicit denial of reporting knowledge to upper management, Mecca's testimony operates as the same; he cannot report what he did not know. While CGC claims this is Respondents' evidentiary gap, the evidential gap is in reality CGC's as knowledge was not established.

c. The March 13 Work Call Does Not Prove Knowledge.

CGC emphasized the "last-minute" nature of the work call to bolster an unlawful motive by Respondents. CGB, 27. However, the record indicates the work call was a safety issue as the stage tiles had bumps, jagged corners, and even screws sticking up requiring immediate repair. TR

[10] Mecca testified that he denied the invitation to the Chat and unequivocally stated that although he had access to the conversation, he did not "browse" through it. TR 3184:25. Indeed, his cursory review was "very brief. I glanced at it, saw names, and I was, nope, decline." TR 3185:9-10. Mecca further testified that "at a later point" he put "two and two together" once he "found out the whole union situation was happening" after Gasca's discharge. TR 3185:14-18; 3174:2-11. CGC failed to put on any refuting evidence.

200:16-24; 491:1-9; 489:6-8, 13-17. Indeed, several dancers were injured as a result of the faulty stage, including toes nails being ripped off. TR 1546:23-25. Further, the timing of the work call is consistent with Respondents' past practice of ordering last minute work calls. TR 2748:9-13; 2750:23-2751:9; 1720:22 (Graham stating "Surprise work calls happen from time to time").[11]

5. The February 6 Rankings Do Not Support Animus.

The ALJ, CGC and Union emphasize DeStefano's February 6 "rankings" of employees in **R 30, R 31, GC 83, GC 84** as evidence of animus and pretext. GCB, 40; UB, 3. Interestingly, they argue that the rankings show that the "discriminates' job performance [was] among the best of Respondents' employees." UB, 3. Yet, a review of the rankings clearly show Bohannon ranked as second worst sound tech, Franco ranked the worst sound tech, Langstaff ranked the worst stagehand, and Suapaia ranked as third worst stagehand. **R 30-R 31**. They also fail to acknowledge that Graham and Hill were not terminated for performance making their rankings irrelevant. Further, Michaels, who had been ranked relatively high, was originally recommended for termination by Estrada, not DeStefano. **R 31**; TR 789:13-17; 791:1-3; 20-23. Finally, Glick was ranked in the middle on February 6, but this was *prior* to her four tardies on February 24, March 2, March 3, and March 13. **R 50**. Indeed, these rankings do not prove animus, but support discriminatees' poor job performance prior to organizing and support Respondents' timeline.

[11] Evidence indicates cards were first passed out at the March 13 meeting. TR 1553:6.15; 1891:8-1892:9; 1942:2-1943:8; 2265:24-2266:6. Without other evidence, CGC's argument is irrelevant. CGC conflates testimony about "cards" and "flyers" highlighting the unreliability of the testimony on this issue. Id. at 25. Interestingly, CGC switches gears by advocating for the reliability of Estrada's testimony on this point, when at the hearing CGC questioned Estrada as to whether he was under the influence of any substance while testifying that day. TR 3132:4-10.

6. The CGC's Sparse Arguments on Individual Discharges Are Unavailing.

CGC doesn't substantively address the specific details of the alleged discriminatees' discharges and rather cherry picks what she presumedly considers to be her strongest arguments and attempts to blanketly challenge Respondent's arguments by example.[12]

CGC argues Glick denied being previously reprimanded for her cell phone use and attendance. GCB, 36. However, Glick admitted she received emails directed toward all employees prohibiting cell phone use and she attended a policies and procedures meeting in which she was advised of the same. TR 1426:2-16; **R 8-R 11**. Glick also admitted to using her cell phone and further admitted that she could not be on her phone and paying attention to the lights or light cues at the same time. TR 1427-1428. Further, contrary to CGC's assertion, Glick did admit DeStefano spoke to her about being late. TR 1432:20-22.

CGC strategically selected testimony in arguing that McCambridge testified Bohannon was one of the good audio techs. GCB, 37. A review of the record makes McCambridge's confusion abundantly clear. McCambridge testified that either he ran the show himself from a remote or the tech would use the space bar. TR 3153:23-3154:10. When asked if Bohannon used the space bar, he said yes. Id. But immediately after, when asked whether he used the remote when Bohannon ran his show McCambridge responded, "According to [**R 82**], she said she never did... That's why I asked her if she did because I don't remember." TR 3154:11-17. The ALJ improperly determined Bohannon was a "good tech" based on this confusion.[13]

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[12] CGC argues that Respondents provided shifting reasons for Hill's discharge, largely relying on **GC 78**. GCB, 13-14. The original form was produced making this argument a red-herring. **GC 34** at 1. Further, the original identifies the main termination reason as "violation of Company policies." Id. Respondents maintain a policy discouraging secondary employment. **GC 99** at 24.

[13] McCambridge also corroborated Saxe's testimony admitting he complained about Bohannon and he wanted a new tech. TR 3146:1-25; 3158:11-18.

7. Respondents Are Not Recidivist Violators and A Notice Reading is Improper.

As the prior case is pending at the Board, it should not be used as a basis for establishing a recidivist violator. See Electrical Workers Local 98, 339 NLRB 470, 470 fn. 2 (2003) (disclaiming reliance on case with pending exceptions before the Board); Fresh & Easy Neighborhood Mkt., Inc., 2012 WL 4424622, at *2 (Sept. 25, 2012). A notice reading remedy is "atypical." Leggett & Platt, Inc., 367 NLRB No. 51 (Dec. 17, 2018). Indeed, even in cases in which multiple, serious violations are found, the Board has refused to issue the extraordinary remedy. See id.; Liberty Bakery Kitchen, Inc., 366 NLRB No. 19 (Feb. 16, 2018); Ishikawa Gasket America, Inc., 337 NLRB 175, 176 (2001). The Board should likewise refuse to issue the extraordinary remedy in this case, or in the alternative should not require the Notice to be read by Mr. Saxe and not require the presence of listed former employees. Indeed, the requirement that the Notice be read by Mr. Saxe without another option is punitive rather than remedial. Teamsters Local 115 v. NLRB, 640 F.2d at 392 (D.C. Cir. 1981). "A reading order directed at a specified individual is 'humiliating and degrading' and 'incompatible with the democratic principles of the dignity of man.'" HTH Corp. v. NLRB, 823 F.3d 668, 676-78 (D.C. Cir. 2016); see also Conair Corp. v. N.L.R.B., 721 F.2d 1355 (D.C. Cir. 1983) (Ginsburg, J., dissenting).

II. CONCLUSION.

For the above reasons, the Board should decline to adopt the ALJ's decision and recommended order.

DATED this 12th day of November, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, I did serve a copy of the foregoing **RESPONDENTS DAVID SAXE PRODUCTIONS, LLC AND V THEATER GROUP, LLC'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER** upon:

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